

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1969

NO. 7

LESTER GUNN, ET AL.,

Appellants

v.

**UNIVERSITY COMMITTEE TO END THE
WAR IN VIET NAM, ET AL.,**

Appellees

On Direct Appeal from the United States District
Court

Western District of Texas
Waco Division

**APPELLANTS' SUPPLEMENTAL BRIEF ON
REARGUMENT**

TO THE HONORABLE CHIEF JUSTICE AND
ASSOCIATE JUSTICES OF THE SUPREME COURT
OF THE UNITED STATES:

At the initial argument of this case in January the Court questioned counsel for both sides as to whether the order of the three-judge court had sufficient finality to be reviewable here. That issue was not discussed in the briefs on the original submission of this case and Appellants are filing this Supplemental Brief in order to discuss the issue.

The opinion below concluded with the paragraph:

“We reach the conclusion that Article 474 is impermissibly and unconstitutionally broad. The Plaintiffs herein are entitled to their declaratory

judgment to that effect, and to injunctive relief against the enforcement of Article 474 as now worded, insofar as it may affect rights guaranteed under the First Amendment. However, it is the order of this Court that the mandate shall be stayed and this Court shall retain jurisdiction of the cause pending the next session, special or general, of the Texas legislature, at which time the State of Texas may, if it so desires, enact such disturbing-the-peace statute as will meet constitutional requirements."

It will be noted that the Court stayed its mandate and retained jurisdiction of the cause pending "the next session, special or general, of the Texas legislature . . ."

The order referred to is dated April 9, 1968 and entered April 10, 1968. (A.2). The Legislature of Texas convened in special session June 4, 1968 and adjourned on July 3, 1968 without taking any action on Article 474, Texas Penal Code.¹

Therefore the above mentioned reservation of jurisdiction was exhausted by July 3, 1968.

It may be that the Court's concern during the argument in January was because there was no separate document labeled "judgment" as required by Rule 58, Federal Rules of Civil Procedure. It is clear that the Court below thought that it was entering a judgment as reflected by its docket entry of April 10, 1968 (A.2). It is important to note however that appealability here is governed solely by Title 28, Section 1253, of the

¹The Legislature met in general session January 14, 1969 and before adjournment passed an amendment to Article 474, Texas Penal Code, which was affective June 12, 1969. The 1969 amendment had no relation to the conditional stay of mandate and in Appellants' view it has no bearing on the present case. For the information of the Court, however, its text is set out as an appendix to this brief at page 9.

United States Code. Neither Rules 73-76 of the Federal Rules of Civil Procedure, in effect when notice of appeal was given in this case, nor the Federal Rules of Appellate Procedure now in effect, nor the 1967 Revised Rules of this Court undertake to govern in any relevant way direct appeals from a statutory three-judge court to this Court.

The statute that does govern these appeals, 28 U.S.C. § 1253, allows appeal to this Court "from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction . . ." Even if it be conceded *arguendo* that the order entered in the court below was not a "judgment" and even if it be conceded *arguendo* that it was not "final," there can be no doubt that it was an "order" granting an interlocutory injunction and it therefore comes squarely within the provisions of the statute.¹

The distinction between a "judgment" and an "order" is made even clearer by 28 U.S.C. § 2101(b) requiring that direct appeal to this Court must be taken within thirty days "from the judgment, order or decree, appealed from, if interlocutory . . ."

¹The full text of Section 1253, Title 28 U.S.C., is as follows:
"§ 1253. Direct appeals from decisions of three-judge courts
Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges. June 25, 1948, c.646, 62 Stat. 928."

The full text of 28 U.S.C., Title 2101 (a) and (b) [(c)-(f) omitted] is as follows:

"§ 2101. Supreme Court; time for appeal or certiorari; docketing; stay

(a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253 and 2282 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the

Thus the Congress in regulating appeals from three-judge courts to this Court has clearly recognized that an "order" is appealable even though it may not be a "judgment."

Even when the jurisdiction of this Court is limited by statute to a "final judgment," the Court has taken a "pragmatic approach" in order to achieve the "just, speedy, and inexpensive determination of every action." *Brown Shoe Co. v. United States*, 370 U.S. 294, 306 (1962). A similar pragmatic approach is even more clearly indicated where, as here, the only question is the degree of formality with which the court below has evidenced its order. See also *Crosby v. Pacific S.S. Lines, Ltd.*, 135 F.2d 470, 473-474 (9th Cir. 1943), and *Hamilton v. Stilwell Van and Storage Co.*, 343 F.2d 453 (3rd Cir. 1965).

Respectfully submitted,

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entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceedings, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final."

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CERTIFICATE OF SERVICE

I, Howard M. Fender, a member of the Bar of the Supreme Court of the United States, do hereby certify that a copy of the foregoing Appellants' Supplemental Brief on Reargument has been served on counsel for the Appellees by depositing same in the United States Mail, postage prepaid, addressed to Mr. Sam Houston Clinton, Jr., 308 West 11th, Austin, Texas 78701, this the _____ day of _____, 1969.

HOWARD M. FENDER
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CRIMES-DISORDERLY CONDUCT

CHAPTER 454

H.B. NO. 57

Be it enacted by the Legislature of the State of Texas:

Section 1. Article 474, Penal Code of Texas, 1925, as amended by Section 1, Chapter 10, Acts of the 51st Legislature, 1st Called Session, 1950, is amended to read as follows:

“Section 1. No person, acting alone or in concert with others, may engage in disorderly conduct. Disorderly conduct consists of any of the following:

“(1) behavior of a boisterous and tumultuous character in a residential area or a public place such that there is a clear and present danger of alarming persons where no legitimate reason for alarm exists; or

“(2) interfering with the peaceful and lawful conduct of persons in or about their homes or public places under circumstances in which such conduct tends to cause or provoke a disturbance; or

“(3) violent and forceful behavior at any time in or near a public place, such that there is a clear and present danger that free movement of other persons will be arrested or restrained, or other persons will be incapacitated in the lawful exercise of business or amusement; or

“(4) behavior involving personal abuse or assault when such behavior creates a clear and present danger of causing assaults or affrays; or

“(5) in a public or private place engages in violent, abusive, indecent, profane, boisterous, unreasonably loud, or otherwise disorderly conduct under

circumstances in which such conduct tends to cause or provoke a disturbance; or

"(6) wilful and malicious behavior that interrupts the speaker of any lawful assembly or impairs the lawful right of others to participate effectively in such assembly or meeting when such conduct tends to cause or provoke a disturbance; or

"(7) behavior near a courthouse or other public building wherein judicial proceedings are being held, designed or having the effect of interfering with the administration of justice, whether by disrupting the courts or by intimidating the judges, witnesses, jurors, or other persons having business with the courts; or

"(8) behavior near any public building wherein matters affecting the public are being considered or deliberated, designed or having the effect of interfering with such proceedings under circumstances in which such conduct tends to cause or provoke a disturbance; or

"(9) wilful and malicious behavior which obstructs or causes the obstruction of any doorway, hall, or any other passageway in a public building to such an extent that the employees, officers, and other persons, including visitors and tourists, having business with the government are denied entrance into, exit from, or free passage in such building; or

"(10) behavior involving the display of any deadly weapon in a public place in such a manner as to alarm or frighten other persons present; or

"(11) enters upon the property of another and for a lewd or unlawful purpose deliberately looks into a dwelling on the property through any window or other opening in it.

"Sec. 2. Any person who violates any of the provisions of Section 1 of this Article shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than Two Hundred Dollars (\$200). For any second or subsequent conviction of any of the provisions of Section 1 of this Article such person shall be punished by a fine of not less than One Hundred Dollars (\$100) nor more than One Thousand Dollars (\$1,000), or by imprisonment in the county jail for not more than thirty (30) days or by both such fine and imprisonment."

Sec. 2. If any provision of this Act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

Sec. 3. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each house be suspended, and this Rule is hereby suspended, and this Act shall take effect and be in force from and after its passage, and it is so enacted.